2011

Ken Merena, an individual, and dba Merena Investments v. Alice M. Merena : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

KEN MERENA, an individual, and dba MERENA INVESTMENTS, Plaintiff, vs. ALICE M. MERENA, Defendant.	Case No. 20110377-CA

REPLY BRIEF OF APPELLANT

AN APPEAL FROM JUDGMENT

William P. Morrison, Esq.
Morrison & Morrison
Attorney for Appellee
352 East 900 South
Salt Lake City, Utah 84111

Loren M. Lambert, No. 5101
David S. Head, No. 13237
Attorneys for Appellant
ARROW LEGAL SOLUTIONS GROUP, PC
266 East 7200 South
Midvale, Utah 84047
Telephone (801) 568-0041

TABLE OF CONTENTS

IN THE UTAH COURT OF APPEALS

KEN MERENA, an individual, and dba MERENA INVESTMENTS, Plaintiff, vs. ALICE M. MERENA, Defendant.	Case No. 20110377-CA

REPLY BRIEF OF APPELLANT

AN APPEAL FROM JUDGMENT

William P. Morrison, Esq.
Morrison & Morrison
Attorney for Appellee
352 East 900 South
Salt Lake City, Utah 84111

Loren M. Lambert, No. 5101
David S. Head, No. 13237
Attorneys for Appellant
ARROW LEGAL SOLUTIONS GROUP, PC
266 East 7200 South
Midvale, Utah 84047
Telephone (801) 568-0041

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FEDERAL CASES
STATE CASES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

KEN MERENA, an individual, and dba MERENA INVESTMENTS, Plaintiff, vs. ALICE M. MERENA, Defendant.	Case No. 20110377-CA

REPLY BRIEF OF APPELLANT

ARGUMENT

I. THE COURT DOES HAVE JURISDICTION BECAUSE A FINAL ORDER WAS ENTERED

As this Court stated:

> For an order to be a final, appealable order, the order must dispose of all parties or claims to an action. Where further action is contemplated by the express language of the order, the order is not a final, appealable order. The district court must also determine the amount of reasonable attorney fees, if any, before the judgment becomes final for the purposes of an appeal.

Wierzbicki v. Heart, 2010 UT App 146, 20100319-CA (UTCA)(internal citations and quotations omitted); *see also* addendum A. In a similar case where there was a dispute

whether a district court's ruling was final and appealable, the Utah Supreme Court stated:

> On the basis of [the] language, as well as the fact that a final order was subsequently entered, it seems obvious that neither the parties nor the court regarded it as a final judgment, otherwise there would have been no purpose in entering the final order.

Swenson Associates Architects, P.C. v. State By and Through Div. of Facilities Const., 889 P.2d 415, 417 (Utah 1994)(internal citations and quotations omitted).

In this case, it is clear based upon its language and the parties agreement that the November 20, 2009, *Ruling and Order Re: Defendant's Motion for Sanctions Against Ken Merena*–one of the orders that Mr. Merena is appealing–is not a final and appealable order.

The Appellee further argues that the April 8, 2011, *Final Order and Judgment*, is not a final and appealable order. Yet the *Final Order and Judgment* expressly states that it is the "final judgment" of the district court and it specifically lists the attorney's fees, fines, and costs that Mr. Merena is ordered to pay to the Appellee and to the court. *See* TR 2994-2994A. It also is final because it does not require any further action from the parties. *See Wierzbicki v. Heart*, 2010 UT App 146, 20100319-CA (UTCA); addendum A.

II. MR. MERENA EITHER PRESERVED THE ISSUES FOR APPEAL, AN EXCEPTION APPLIES, OR THE ISSUES DID NOT NEED TO BE EXPRESSLY PRESERVED BECAUSE MR. MERENA IS APPEALING DISTRICT COURT ORDERS & JUDGMENTS

The Utah Rules of Appellate Procedure, Rule 4(a), states that a party has the right

to appeal any district court's final orders and judgments by filing a notice of appeal in the trial court within the appellate deadlines. See Utah R. App. P. 4(a). The Appellee argues that Mr. Merena's "brief is woefully silent as to how or when [his first two appellate issues] were preserved for appeal." Brief of Appellee at pg. 22. This, however, is not the case.

A party needs to preserve an issue for appeal if it involves what he or she believes to be the district court's misapplication of court rules, such as the Utah Rules of Evidence, etc. However, if both parties present evidence and argument at an evidentiary hearing, via dispositive motions or at a final trial, then the district court's orders and judgments issued thereafter do not require an additional pleading to preserve a party's right to appeal any such order or judgment. The very nature of the process preserves such issues for appeal. If this were not the case, parties would be required to file a post-judgment objection to every judgment or order resulting from a motion, oral argument or trial.

Moreover, as Apellee stated in her brief, "when rulings and orders have gone against [Mr. Merena], he has filed motions to reconsider or to alter or amend the court's rulings" such as Appellant's Motion to Alter or Amend Ruling and Order Dated May 11, 2009 or Final Order re: Dismissal of Specified Claims. Appellee Brief at pg. 23; see also TR 1758-1812. In this appeal, the first appellate issue concerns the district court's Ruling and Order Re: Defendant's Motion for Sanctions Against Ken Merena. See Appellant

Brief at pg. 7; TR 2498-2505. The second appellate issue concerns three of the District Court's orders: (1) Order Re: Defendant's 2nd Verified Application for Attorney Fees; (2) Contempt Hearing Decision Findings of Fact, Conclusions of Law, and Order; and (3) Judgment Re: Contempt Order Costs and Attorney Fees. See TR 2692-2695, 2842-2851. Therefore these issues by their presentation have been preserved.

Admittedly, it is true that Mr. Merena didn't preserve his third appellate issue for appeal, but as stated in more detail in his Brief, the exceptional circumstances, plain error, and liberty interest exceptions apply which allows the Court to review the third issue on appeal. See Brief of Appellant at pg 32; State v. Weaver, 122 P.3d 566, 570 (Utah 2005); State v. Adams, 2011 UT App 163, 20090793-CA (UTCA); State v. Brown, 853 P.2d 851, 853 (Utah 1992); addendum B.

III. DISMISSAL IS A LAST RESORT

The parties and the courts agree that dismissal of a case is a sanction of last resort. See Darrington v. Wade, 812 P.2d 452, 456 (Utah App. 1991)(quoting Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 961 (Utah Ct.App.1989)). Appellee argues that the district court's dismissal of Mr. Merena's case was justified as a "last resort" because the district court had already sanctioned Mr. Merena previously for "improper, abusive written discovery tactics." In support thereof, the Appellee invites the Court, in its many duties to peruse 326 pages of the trial record. See Brief of Appellee at pg. 24; TR 938-952 & 2476-2788. Due to her improper, imprecise and patently over broad citation, Appellant's

counsels, who have reviewed the trial record, are at a loss to identify what exactly the Appellee is referring to in support of her argument.

Therefore, in the Appellee's own words, it is not this court nor Mr. Merena's "obligation to ferret through the record" in order to know what evidence she is referring to and, "this court [should] not consider any facts not properly cited to, or supported by, the record." See Brief of Appellee at pg. 23; *Garner State v. Garner*, 52 P.3d 467, 470 (Utah App. 2002)(quoting *Phillips v. Hatfield*, 904 P.2d 1108, 1109 (Utah Ct.App.1995)). Consequently, "[i]nasmuch as [appellee] has failed to properly brief this argument, [this court should] decline to address its merits." *Walker v. U.S.General, Inc.*, 916 P.2d 903, 908 (Utah 1996).

Nevertheless, prior to the district court's dismissal of Mr. Merena's case on November 20, 2009, the district court entered monetary sanctions against Mr. Merena. It did so, due to discovery related issues, on February 19, 2009, in the amount of $717.50 while Mr. Merena was still represented by counsel. See TR 2476-2478. Then, it did so again, on May 11, 2009, in the amount of $260.00 when Mr. Merena, as a pro se litigant, deposed the Appellee's previous attorney. See TR 938-952 & 1377-1381. All told these sanctions, as acknowledged by Appellee as a "fairly nominal amount," totaled $977.50.

It was only then, on November 20, 2009, that the District Court dismissed Appellant's case and imposed an additional $3,271.35 in monetary sanctions against Mr. Merena. See TR 2667-2668. Appellee asserts that since the trial court had previously

imposed the "fairly nominal amount," of $977.50, that the dismissal–the sanction of "last resort"–was inevitable and therefore unassailable.

Yet, is this not a significant upping of the ante? Moving, as Appellee stated, from a "fairly nominal," sanction to dismissal and the imposition of an additional $3,271.35 in monetary sanctions at a time when Mr. Merena was a pro se litigant. See TR 2692-2695. Appellant would submit that in light of this, dismissal was not implemented as a last resort, nor was this, "a graduated scale of sanctions." See Appellee Brief at pg. 15. The additional $3,271.35 in monetary sanctions was a much more severe sanction than the "fairly nominal" amount the district court had previously entered against him. Additionally, before this sanction of "last resort" was imposed, the district court may have also required Mr. Merena to reimburse each deponent for their time, required him to engage counsel before proceeding further with his case, or required the filing of a cost bond, etc.

In any event, dismissal of a cause of action is too seductive and convenient a remedy for the trial court to impose without it truly being the remedy of last resort–to be employed only when other remedial measures would be wholly inadequate. While Mr. Merena's actions merit censure, there were mitigating circumstances and other less drastic remedies available to the district court. It was therefore an abuse of discretion for the district court to dismiss Mr. Merena's case, which the Court should accordingly vacate.

A. Sanctions Should be Based on the Facts and Law Applicable in Each Particular Case and Not on the Facts and Applicable Law in Other Cases

Appellee has also quoted conclusory statements made by adjudicators about Mr. Merena's behavior in other litigation between the parties and has mischaracterized Appellant's current circumstances. Appellant's counsels submit that if Appellee were required to cite the facts that were found by these other courts in support of their conclusory statements and were required to indicate what remedies were requested therein and declined, their impact would be significantly diminished for several reasons.

First, they would show that these statements reflect more on Mr. Merena's behavior and tactics than upon the substance of his legal claims. Second, Appellant submits that he is the recipient of cultural and societal norms in which it is frowned upon, even when there are legitimate basis for doing so, for a litigant to challenge a bankruptcy and especially for a male litigant to take legal action against a verbally irresponsible and verbally violent estranged spouse–most believe such behavior should just be tolerated. Third, any sanctions and penalties requested by Appellee in those other cases have been either imposed or were denied and therein remedied the Appellant's alleged misdeeds and are therefore irrelevant. Last, as heretofore argued, many of Mr. Merena's misdeeds were due to his mis-perception and naivety regarding the rules of procedure and evidence.

In conclusion, the other cases mentioned by the Appellee–while they may involve the same parties–do not apply in the current case and they should be accordingly disregarded by the Court. Furthermore, the Apellee has not provided sufficient

information thereon for such facts to bear upon a resolution of the issues in this case.

B. Mr. Merena is Not an Attorney

Appellee also argues that the district court's dismissal of Mr. Merena's case was warranted because Mr. Merena has been involved in other lawsuits. Mr. Merena, however, is not an attorney, has not been habitually pro se[1], nor is he a, "professional litigant." Mr. Merena has not gone to law school nor has he passed any state bar exam, including the Utah state bar exam. For this reason when Mr. Merena acted as a pro se litigant in the current case he misunderstood the rules of evidence, other rules, and district court orders related to discovery which contributed to his judgment which precipitated the sanctions.

C. Mr. Merena Does Have the Right to Legal Counsel

In her opening, and throughout her argument, rather then address the law and facts supporting her position, Appellee has indirectly attacked Mr. Merena's counsels for their, "active aid and assistance," in an alleged ongoing campaign to, "harass Davis, strangle her with litigation, and destroy her financially." *See* Brief of Appellee at pgs. 3, 8, & 13. What is lost from these characterizations is, what in most cases is understood by the legal profession, that there is another story here.

For what it is worth, it was Appellee, who after a very short marriage of 14 months

---

[1]In fact Mr. Merena has not heretofore been a pro se litigant, and in the case cited by Appellee, he was the defendant and he prevailed.

to the Appellant in which Mr. Merena funded her education and fully supported her and her children, filed for a divorce requesting a substantial property settlement and alimony award. For example, the parties did not acquire any real property during the marriage, but the Appellee petitioned the Court for the appreciation in value in the Appellant's premarital home, that he pay "bridge alimony," that he pay all the marital debts, for the Appellee's medical procedure, and her attorney's fees. *See* addendum C. The Appellant subsequently filed and was granted an annulment. See TR 2498-2505. Furthermore, it should be understood that immediately prior to the trial court's dismissal of Mr. Merena's only remaining cause of action, that cause of action was solely for injunctive relief from Apellee's persistent campaign to defame Mr. Merena's reputation. *See* TR 2486-2487. Appellee could have easily ended any alleged, "campaign to destroy her financially," by agreeing to refrain from defaming Mr. Merena. In fact, Mr. Merena had even offered to settle his defamation lawsuits for an agreement that the Appellee would cease engaging in defamatory behavior. *See* TR 2494-2497. If Appellee had accepted Mr. Merena's proposal, then she would have saved both the parties thousands of dollars in attorney's fees and costs.

Furthermore, rather than accept the Appellant's Rule 68 Offer or agree to the imposition of an injunction, to curry favor from the district court and play up her status as a victim, Appellee even represented to the district court that she, "already agree[d] to," obey the law and refrain from, "engag[ing] in libel or slander against the," Appellant and

that the, "Court [could] tell her to obey the law." *See* TR 1864-1870.

Lastly, without justifying the means and tactics that were employed by Mr. Merena or any prior counsel, as officers of the court, Mr. Merena's current counsels, who have endeavored to steer clear of any opprobrious behavior and have not been involved in any prior sanctionable conduct, would indicate that they have evaluated Mr. Merena's claims, found them to be substantially meritorious and currently assert, although this court may ultimately disagree with their arguments, that this appeal is filed in good faith. The trial court itself actually stated his claims were, "seemingly meritorious." See TR 2498-2505.

In short, even though this is a civil case, the sanctions imposed are similar to criminal penalties imposed in criminal prosecutions. Therefore, as founding father John Adams said, "Counsel is the last thing an accused person should lack in a free country."

IV. THE BURDEN OF PROOF IN CIVIL CONTEMPT HEARINGS IS ON THE DEFENDANT

Appellee argues that because Mr. Merena was not present at the civil contempt hearing "he made no incriminating statement at the hearing, and the burden of proof never shifted to him to do anything at the hearing." See Appellee of Brief at pg. 28. This, however, is not the case. For an order to show cause to be issued by the court, the moving party has to merely make a prima facie showing that the alleged disobedient party has not complied with the district court's orders. See *Coleman v. Coleman*, 664 P.2d 1155, 1157 (Utah 1983). After the court issues the order to show cause, the burden shifts to the receiving party to bear or lose by default. See id. Hence, Mr. Merena had the burden of

proof.

Given that contempt proceedings allow for the imposition of criminal penalties such as a loss of liberty, Mr. Merena submits that he should have been afforded the protections and rights given to criminal defendants–including the right against self-incrimination–and the law should accordingly be changed so the burden of proof is placed on the moving party in contempt proceedings and not on the opponent thereof.

To the contrary, if the burden of proof was not on Mr. Merena at the order to show cause hearing, the Appellee would have been required to show that Mr. Merena (1) knew what the district court required of him, (2) that he had the ability to comply with the district court's order–i.e. he could pay the monetary sanctions by the district court's deadlines–and, (3) that he willfully and intentionally refused to comply with the district court's orders. The Appellee did not provide evidence at the order to show cause hearing to fulfill all of the above elements for sanctions to be granted, and as the district court found, there was not any evidence provided regarding Mr. Merena's ability to pay the monetary sanctions that had been entered against him by the district court's deadlines. See TR 2842-2848. Therefore if the burden of proof had been placed upon the Appellee during contempt proceedings, in this case, she would not have met her burden of proof.

Appellant asserts that given the criminal nature of contempt proceedings that this Court should overturn the district court's Contempt Hearing Decision Findings of Fact, Conclusions of Law, and Order. See id.

A. The Courts Do Not Have the Responsibility to Collect Litigants' Judgments

In this case the Appellee also asks this court to infer that since Mr. Merena has, "Employ[ed] an army of attorneys to represent him," see Appellee Brief at pg. 3, and that since, "Not coincidentally, Merena is represented by the same counsel in [a second defamation] case as is currently representing him in this appeal," See id. at 13-14, that Mr. Merena could have paid the imposed sanctions and that his arguments should be disregarded. See id.

There is no case nor statutory law that supports this argument and allows such an inference to be drawn, nor does the law indicate that this court may draw any adverse inference from the fact that a party has representation. Moreover, there is no law that would allow an adverse inference to be drawn if a litigant chooses to use his own resources, if any, or the aid of others, to retain legal counsel instead of paying a judgment. To the contrary, under Utah law the judgment creditor has the burden to collect monetary judgments.

Mr. Merena had and has the right to representation. That fact is irrelevant to any issue that was before the trial court or is currently before this Court. The fact remains that the Appellee has never provided any evidence–other than the foregoing allegations–that Mr. Merena had the ability to pay the district court's sanctions. Furthermore, Appellee has also not availed herself of the appropriate collection mechanisms under Utah law.

Contrarily, after the district court entered $4,248.85 in monetary sanctions against

Mr. Merena and after it dismissed his case, the Appellee used the district court as a debt collector to enter an additional $5,589.15 in monetary sanctions, issue a $20,700 bench warrant, and impose a 60 day term of incarceration against Mr. Merena for not "timely" paying previous sanctions by deadlines set by the district court. See TR 2842-2851.

In 2010 in the state of Utah, 79 percent of judgments remained unsatisfied; representing more than $31.6 million in court judgments. See addendum D; L. Prichard et al., 79% of Utahns with Court-Ordered Debt Don't Pay, Investigation Shows, (October 25, 2010), http://www.deseretnews.com/m/article/700076359. That leaves a very small portion–21 percent of judgments representing about $2.25 million–that were fully paid. See id. Why should the courts treat the Appellee different from any other judgment creditor when damage awards remain unsatisfied? Should more penalties, fines, warrants, be assessed in all Utah cases when judgments go unpaid?

Here, in fact by reacting in this manner, the district court became a partisan and discarded its role as a neutral adjudicator when it imposed additional sanctions against Mr. Merena for not contemporaneously paying sanctions. Until the courts are willing to take on the heavy lifting of all judgment creditors, it was misplaced for the district court to selectively do so in this case and enter additional sanctions upon Mr. Merena solely for non-payment of the monetary awards and not due to any additional misbehavior.

The Court should therefore overturn the May 25, 2010, and August 25, 2010, orders granting the additional sanctions.

CONCLUSION

Mr. Merena respectfully requests that the Court of Appeals vacate the trial court's dismissal of his case, remand it for trial, overturn the additional sanctions issued at the August 18, 2010, OSC hearings, and alter the law to give litigants in civil contempt proceedings the rights afforded criminal defendants, including the right against self-incrimination and the imposition of the burden of proof on the moving party.

DATED this 28 day of December, 2011.

ARROW LEGAL SOLUTIONS GROUP, PC

David S. Head/Loren M. Lambert
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2011, two true and correct copies of the foregoing document were mailed, postage prepaid, to:

William P. Morrison, Esq.
Morrison & Morrison
352 East 900 South
Salt Lake City, Utah 84111
willmorrison01@gmail.com

ADDENDUM

ADDENDUM A

Wierzbicki v. Heart, 2010 UT App 146, 20100319-CA (UTCA)

2010 UT App 146

Michele Wierzbicki, Plaintiff and Appellee,

v.

Andrea Heart, Defendant and Appellant.

No. 20100319-CA

Court of Appeal of Utah

June 4, 2010

Not For Official Publication

Third District, West Jordan Department, 090420028 The Honorable Terry L. Christiansen

Andrea Heart, West Jordan, Appellant Pro Se

James A. McIntyre and Sarah E. Viola, Salt Lake City, for Appellee

Before Judges McHugh, Thorne, and Voros.

MEMORANDUM DECISION

PER CURIAM:

Andrea Heart appeals the district court's order entered on April 1, 2010. This matter is before the court on a motion for summary disposition. We dismiss the appeal without prejudice.

Generally, "[a]n appeal is improper if it is taken from an order or judgment that is not final." Bradbury v. Valencia, 2000 UT 50, ¶ 9, 5 P.3d 649. Indeed, this court lacks jurisdiction to consider an appeal unless it is taken from a final, appealable order. See id. ¶ 8. For an order to be a final, appealable order, the order must "dispose of all parties or claims to an action." Id. ¶ 10. Where further action is contemplated by the express language of the order, the order is not a final, appealable order. See State v. Leatherbury, 2003 UT 2, ¶ 9, 65 P.3d 1180. The district court must also determine the amount of

reasonable attorney fees, if any, before the judgment becomes final for the purposes of an appeal. See Promax Dev. Corp. v. Raile, 2000 UT 4, ¶ 15, 998 P.2d 254.

The district court's April 1, 2010 order expressly contemplates a further order of the court regarding the proceeds derived from the sale of the parties' real property. The order also fails to resolve the remaining issue of attorney fees. Thus, the April 1, 2010 order is not a final order for purposes of appeal. See id.

Accordingly, the appeal is dismissed without prejudice to the filing of a timely appeal from a final order.

ADDENDUM B

State v. Adams, 2011 UT App 163, 20090793-CA (UTCA)

2011 UT App 163

State of Utah, Plaintiff and Appellee,

v.

Verbery Adams, Defendant and Appellant.

No. 20090793-CA

Court of Appeal of Utah

May 19, 2011

Third District, Salt Lake Department, 081907684 The Honorable William W. Barrett

Sherry Valdez and David P.S. Mack, Salt Lake City, for Appellant

Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Appellee

Before McHugh, Thorne, and Roth, Judges.

OPINION

Stephen L. Roth, Judge

¶1 Verbery Adams appeals his conviction following a bench trial for attempted murder, a first degree felony. Adams contends that the trial court erroneously admitted into evidence a fourteen-year-old conviction for murder in violation of Utah Rule of Evidence 404(b)'s notice and noncharacter purpose requirements. See Utah R. Evid. 404(b). We affirm.

BACKGROUND

¶2 On October 4, 2008, Adams attended a party at an apartment complex where he and Allan Saena got into a fight. Allan, who was very intoxicated, punched Adams because Adams was talking to "one of [Allan's] girls." Others joined the brawl until approximately five men were engaged in beating Adams. Eventually, the fight broke up and Adams ran to his car, an SUV. As Adams was driving past the apartment building,

Allan's cousin, Gary Saena, and Gary's fiancee, Jennifer Tafi, walked across the street. Adams hit Gary with his vehicle, clipping his left hip and causing him to roll over the hood of the car. Gary managed to land on his feet, and he and a couple others chased Adams on foot. Allan, who had witnessed Adams hit his cousin, ran in front of Adams's car and began pounding the hood in an effort to make Adams stop. Instead, Adams drove over Allan with the car.

¶3 Gary ran to Allan and lifted his head and upper body off the street. Adams circled the building and drove by the party again a "minute or two" later for the purpose, according to him, of picking up his girlfriend who had been left behind. When Gary heard Tafi screaming, however, he looked up to see Adams's car coming at him and Allan at approximately thirty to forty miles per hour. Gary then tried to "drag[Allan] out of the way so he wouldn't get hit, but th[e car] . . . caught [Allan's] legs a second time, " driving over them at about the knees.

¶4 A security officer for the apartment complex was driving behind Adams when he came around the building for a second time. He testified that he did not witness Adams's vehicle strike anyone nor did he see anyone lying in the road. Adams continued driving but stopped some distance past the group that had gathered around Allan. The security officer parked his car in front of Adams's and got out to speak with him. When Adams reported that he had been assaulted, the security officer instructed him to wait in his car while the security officer went back to speak with other witnesses. After the security officer departed, Adams left the scene in his vehicle. The other witnesses told the security officer that Adams had struck Allan with his car, and at that point, the security officer observed an injured male lying in the grass. Allan was treated at the hospital for injuries consistent with his being run over by a vehicle at least once and not inconsistent with being struck twice. His most severe injuries included a broken pelvis, a broken right femur, several fractures to the vertebrae, two broken ribs, a broken left collarbone, and a lung contusion. Allan was released from the hospital in a wheelchair two-and-a-half weeks later. He spent three months in the wheelchair and another two months using a walker.

¶5 Adams was charged with two counts of attempted murder: a first degree felony charge for intentionally or knowingly attempting to kill Allan, see Utah Code Ann. § 76-4-101(1) (2008) (setting forth the elements of attempt); id. § 76-5-203(2)(a) (Supp. 2010) (listing elements of first degree murder as intentionally or knowingly causing the death of another); id. § 76-4-102(1)(c)(i) (2008) (classifying attempted murder under sections 76-4-101(1) and 76-5-203(2)(a) as a first degree felony), and a second degree felony charge for his actions against Gary, see id. § 76-4-101(1) (setting forth the elements of attempt); id. § 76-5-203(2)(b) (defining as murder the commission of "an act clearly dangerous to human life, " with the intent to cause serious bodily injury, that causes the death of another); id. §§ 76-4-102(l)(b)-(c), 76-5-203(a) (classifying attempted

murder under sections 76-4-101(1) and 76-5-203(2)(b) as a second degree felony).

¶6 Approximately five months before trial, the State notified defense counsel that it intended to "introduce [Adams]'s 1995 Murder conviction [for killing someone with his vehicle] in the State of Illinois ... to establish knowledge, intent, and absence of mistake or accident in the event that [Adams] testifie[d] at the trial and put[] his knowledge or intent at issue." On the morning of the bench trial, the State moved to admit a certified copy of Adams's conviction under rule 404(b) of the Utah Rules of Evidence. Over the defense's objection, the trial court determined that the conviction was admissible, observing that if the case were before a jury, the court "probably wouldn't allow it" but that admission "would [not] be prejudicial in terms of [the court] being the [factfinder] in this case." The court then cautioned the parties that it was concerned with "what transpired on October 4, 2008, " not fourteen years earlier.

¶7 During trial, an investigating officer testified that in the course of an interview with Adams following the October 4 incident, Adams had mentioned an incident in Chicago in 1995 in which he had hit a person with his vehicle. Defense counsel objected to this testimony, arguing that it was "hearsay" and that "the State has other methods of introducing this." At that point, the State offered a certified copy of a statement of conviction for murder in Illinois in 1995; the court overruled Adams's objection to the officer's testimony, stating that it had "already told [the prosecutor] that [it] w[ould] allow" the conviction in evidence. The defense raised no objection to the certified copy of the statement of conviction itself, either as to its admissibility in general or as to the fact that the State had offered it in its case-in-chief rather than, as its notice had stated, in rebuttal in the event that Adams testified and raised the issue of his intent. The court admitted the statement of conviction "to the extent it may or may not be helpful." Once the 1995 conviction was admitted, the State indicated, "[W]e're not going to talk about that Chicago incident, " and did not question the officer further regarding the conviction. The only other mention of the prior conviction occurred during the State's closing argument when the prosecutor stated that, based on the circumstances of this case and his prior conviction for murder with a vehicle, a "car is just [Adams's] preferred weapon."

¶8 In a detailed ruling from the bench, the trial court convicted Adams of first degree attempted murder but acquitted him of the second degree attempted murder charge. The court did not mention the prior conviction in its ruling. Adams now appeals the trial court's decision to admit the fourteen-year-old conviction for murder in Illinois.

ISSUES AND STANDARDS OF REVIEW

¶9 Adams contends that the trial court erred in admitting the prior conviction both because the State failed to give reasonable notice of its intent to introduce bad acts evidence and because it was presented to show propensity rather than for a noncharacter

purpose. See generally Utah R. Evid. 404(b) (allowing prior convictions to be admitted for noncharacter purposes provided that the State give the defense notice of its intention to introduce such evidence). We review a trial court's evidentiary rulings under rule 404(b) for abuse of discretion. See State v. Nelson-Waggoner, 2000 UT 59, ¶16, 6 P.3d 1120. "We will reverse an erroneous evidentiary ruling only if, absent the error, there is a reasonable likelihood that there would have been a more favorable result for the defendant." State v. Kohl, 2000 UT 35, ¶17, 999 P.2d 7 (internal quotation marks omitted).

¶10 While Adams preserved his contention that the conviction should not have been admitted at all by his opposition to the State's motion in limine, Adams did not object to the timing of its introduction, either during the motion in limine or at trial.[1]Specifically, Adams did not object that the State had offered the conviction during its case-in-chief, contrary to its notice, which stated that the State would introduce prior bad acts evidence only if Adams "testifies at the trial and puts his knowledge or intent at issue." Consequently, Adams has failed to preserve the timing issue for appeal, see State v. Low, 2008 UT 58, ¶17, 192 P.3d 867 (stating that preservation requires a party to raise an issue to the trial court's attention so that the court has an opportunity to rule on it), and we will consider it under the plain error doctrine, see id. ¶ 19 (recognizing plain error as an exception to the preservation requirement). "To prevail under plain error review, a defendant must demonstrate that [1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome." Id. ¶ 20 (alterations in original) (internal quotation marks omitted).

ANALYSIS

I. Adams Was Not Prejudiced by the Admission of His Prior Conviction.

¶11 On appeal, Adams has raised serious issues about the admissibility of the fourteen-year-old prior conviction. We do not address that issue here, however, because any error in admissibility was harmless.[2] Consequently, we affirm the conviction.

A. Judges, Sitting as Finders of Fact in Bench Trials, Are Presumed To Be Less Likely than a Jury To Be Prejudiced by Evidence of Prior Crimes.

¶12 This case was tried not to a jury, but to the court. Although the nature of the proceedings should not affect the admissibility of evidence, we recognize a presumption that the court considers only admissible evidence and disregards any inadmissible evidence. See State v. Burke, 102 Utah 249, 129 P.2d 560, 562 (1942); see also People v. Naylor, 893 N.E.2d 653, 665 (111. 2008) (presuming that courts consider prior convictions "only with respect to the purpose for which [they were] competent" (internal

quotation marks omitted)). As a corollary to this general principal, judges in bench trials are presumed to be less likely than juries to be prejudiced by prior bad acts evidence, such as the prior conviction at issue in this case.

[T]he judge in a bench trial, as in this case, acting as a trier of fact, is presumably less likely than a jury to be prejudiced by evidence of prior crimes, wrongs, or acts .... "[B]ecause it can be safely assumed that the trial court will be somewhat more discriminating in appraising both the competency and the effect properly to be given evidence, the rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury."

State v. Featherson, 781 P.2d 424, 431 (Utah 1989) (quoting State v. Park, 17 Utah 2d 90, 404 P.2d 677, 679 (1965)); see also State v. 633 E. 640 N., 942 P.2d 925, 930 (Utah 1997) (stating that the risk of unfair prejudice from wrongly admitted evidence is "primarily of concern during a jury trial"). The trial judge, in fact, seemed to have had just this presumption in mind when he alluded to the fact that he would not have admitted the prior conviction in a jury trial but that its admission "would [not] be prejudicial in terms of [the court] being the [factfinder] in this case." And with this presumption in mind, we now consider whether there is "a reasonable likelihood that [in the absence of any error in admission,] there would have been a more favorable result for the defendant." Kohl, 2000 UT 35, ¶ 17 (internal quotation marks omitted).

B. Adams Has Failed To Demonstrate that the Trial Court's Verdict Likely Would Have Been Different but for the Admission of the Prior Conviction.

¶13 Adams acknowledges the presumption that trial judges recognize the responsibility and have the commensurate ability to appropriately weigh and consider evidence—even evidence that should not have been admitted—as a general tenet but argues that, in this case, the presumption is unwarranted. In particular, Adams contends that the trial court's admission of the evidence "demonstrates that the prior conviction was considered in Adams'[s] guilt determination."

¶14 To support his contention, Adams relies on the Illinois decision in People v. Naylor, 893 N.E.2d 653 (Ill. 2008), and the Massachusetts decision in Commonwealth v. Darby, 642 N.E.2d 303 (Mass. App. Ct. 1994). Both cases recognize the general presumption that a trial judge, sitting as the finder of fact, considers the evidence for its proper worth. See Naylor, 893 N.E.2d at 665; Darby, 642 N.E.2d at 306-07. In each, however, the reviewing court determined that the presumption had been rebutted because the inadmissible evidence actually factored into the trial court's determination of the defendant's guilt. See Naylor, 893 N.E.2d at 666-67; Darby, 642 N.E.2d at 306. Although we agree that Naylor and Darby set forth the law appropriately, the facts of this case make those decisions less helpful to Adams's position.

¶15 In Naylor, the Illinois Supreme Court observed that "[w]here an objection has been made to the evidence and overruled, it cannot be presumed that the evidence did not enter into the court's consideration. The ruling itself indicates that the court thought the evidence proper." 893 N.E.2d at 666. Because the trial court admitted inadmissible evidence, the Naylor court reversed the defendant's conviction. See id. at 667. Adams argues we must take the same approach here. Although we do not disagree with the principle set forth in Naylor, the court's language must be understood in context. There, the government moved to admit a prior conviction for aggravated battery that occurred in December 1990 for the purpose of impeaching the defendant's credibility. See id. at 658. The defense objected, citing the state's ten-year limit on admitting prior convictions for impeachment purposes. See id. The trial court overruled the objection and received the conviction in evidence. See id. at 658, 666. The Illinois Supreme Court decided that the trial court had misapplied the ten-year rule and that the conviction had therefore been wrongly admitted. See id. at 656, 665-67. The supreme court recognized the presumption that a trial judge, sitting without a jury, disregards evidence that is not properly admissible. See id. at 665 ("As a matter of law, we must presume that the trial court considered defendant's prior conviction only with respect to the purpose for which it was competent." (internal quotation marks omitted)). But the trial court's ruling that the prior conviction was admissible on the basis that it believed the conviction was obtained within ten years of the offense "indicate[d] that the court thought the evidence proper." Id. at 666. Thus, the supreme court had considerable doubt that the trial court disregarded the earlier conviction when judging the defendant's credibility. See id. at 666-67. As a result, it concluded that the defendant had successfully rebutted the presumption that the court only considers competent evidence and reversed the defendant's conviction. See id. at 665-67.

¶16 In the Massachusetts Appeals Court's decision in Darby, the trial court had erroneously admitted highly prejudicial and irrelevant photographs in a bench trial. See 642 N.E.2d at 304-05. The court of appeals reversed. See id. at 307. In so doing, the court recognized the standard presumption regarding the ability of trial judges to deal appropriately with inadmissible evidence, noting that "where the fact finder is a judge, not a jury, ... [a] departure from usual procedure is not likely to be prejudicial." See id. at 306 (omission and alteration in original) (internal quotation marks omitted). Indeed, it recognized that while a "judge, sitting without a jury, in ruling upon the admissibility of evidence, will at times hear or see matters that would be excluded from a jury's consideration, " review of that inadmissible evidence is not necessarily prejudicial. See id. at 306. The court, however, distinguished the situation where the "judge has not indicated whether he or she has considered improperly admitted evidence":

> The judge's review of ultimately inadmissible evidence would not be prejudicial error where the judge stated that he or she either was not affected by the evidence or did not consider it. Where a judge has not indicated whether he or she has considered improperly

admitted evidence, we can only speculate upon the effect of that evidence. When we are not in a position to say that it had none . . . such doubts as we entertain can only be resolved in favor of the defendant.

Id. (omission in original) (citation and internal quotation marks omitted). The Darby court reversed the defendant's conviction because the evidence of the defendant's guilt was "not overwhelming" and because the trial court had determined that "the photographs had 'some probative value'" but did not indicate what weight it actually gave to the photographs in convicting the defendant. See id.

¶17 The present case is distinguishable from both Naylor and Darby because in each of those cases, the trial court admitted the evidence without reservation, while the trial court here indicated on the record that, from the beginning, it gave little weight to the prior conviction. In considering the State's request for admission of Adams's prior conviction, the trial court recognized the potentially prejudicial impact the prior conviction may have had on a jury, but it did not think "it would be prejudicial in terms of [the court] being the [factfinder] in this case." The court assured the parties, however, that its "real concern during the course of this trial is what transpired on October 4, 2008, " the date of the charged offense. When it actually admitted the statement of the prior conviction a relatively short time later, the trial court stated that the conviction would be admitted "to the extent it may or may not be helpful." Such an equivocal, even dismissive, statement at the time of admission appears to support the implication from the court's statements in ruling on the motion in limine that it considered the conviction to be of little moment. See generally State v. Featherson, 781 P.2d 424, 431 (Utah 1989) (presuming that trial judges afford evidence only the weight and effect it deserves); Naylor, 893 N.E.2d at 665 (same).

¶18 This conclusion finds significant additional support in the court's detailed ruling from the bench explaining its decision to convict Adams, where it evaluated the credibility of the witnesses, reconciled conflicting evidence, and set out the basis for its decision to convict on a single count of attempted murder. The court stated that it found Tafi's testimony that Allan had been struck twice to be very credible and that Gary's testimony corroborated Tafi's. The court also explained how it reconciled the inconsistencies between their testimonies and the security officer's, primarily by suggesting the security officer was not as close to Adams as he remembered being and that the court was unclear as to precisely when the security officer began following Adams. Finally, the court explained why it was convinced that Adams had the intent to kill Allan when he struck him a second time. It recognized that Adams "was probably angry" at being assaulted, but the court thought it was telling that Adams chose to flee rather than to cooperate with the security officer, concluding that Adams's own innocent explanation for having left the area was not credible. The court also found incredible Adams's explanation that he circled the building a second time to pick up his girlfriend,

rather than just leaving the complex, and concluded that his actions were strong evidence of his criminal intent.[3] Nowhere in its detailed ruling did the trial court mention the prior conviction, and we see nothing in its statements explaining the ruling that suggests that the court allowed the prior conviction to affect its decision. To the contrary, the court's ruling focused solely on the events of the night in question, reinforcing a conclusion that, throughout the trial, the court remained focused on "what transpired on October 4, 2008, " not fourteen years earlier.

¶19 Further, the court acquitted Adams of attempted murder on the second count for his actions against Gary. Because there was some evidence to support a conviction on this count, the fact that the court did not convict Adams on this charge lends further support to our conclusion that the prior conviction did not influence the verdict. Cf. Commonwealth v. Darby, 642 N.E.2d 303, 306 n.4 (Mass. App. Ct. 1994) (placing no weight on the fact that the court also acquitted the defendant on two counts where "there was no evidence whatsoever as to those [counts]" (emphases added)).

¶20 Because the record indicates that the trial court was not improperly influenced by Adams's prior conviction, we conclude that there is little likelihood of a different verdict had the evidence not been admitted and any error in its admission was therefore harmless.

II. Adams Has Not Established that the Court Plainly Erred in Allowing the Prior Conviction To Be Admitted in the State's Case-in-Chief.

¶21 Adams also contends that he was prejudiced because the prior conviction was admitted in violation of the State's rule 404(b) notice, which indicated that the State would introduce the prior conviction only if Adams testified and put intent or knowledge at issue. Because this issue was not preserved below, we review it for plain error.

¶22 To succeed on a claim of plain error, a defendant must show that there was an error, that it was obvious, and that it was prejudicial. See State v. Low, 2008 UT 58, ¶ 20, 192 P.3d 867. Because we conclude that any error that may have occurred was not harmful, we do not address whether an error occurred that should have been obvious to the trial court.

A. Adams Has Failed to Establish Any Prejudice.

¶23 Adams claims that his defense was prejudiced as a result of the State's failure to provide notice that it intended to introduce the prior conviction in its case-in-chief. Specifically, he asserts that he was surprised by the introduction of the prior conviction as part of the State's case and that he otherwise "would have had a chance to prepare to distinguish the facts of the prior conviction from the facts of the present case." While

Adams indicates that this would have included preparing testimony of other witnesses or preparing to testify on his own behalf, he does not provide any details about what that testimony would have been or how it would have impacted the trial. Cf. State v. Arguelles, 921 P.2d 439, 441 (Utah 1996) (observing, in the context of an ineffective assistance of counsel claim, that neither the record nor the appellate brief suggested that the defendant would have testified in the absence of the attorney's error or indicated what that testimony would show, and holding that an "invitation to speculate" about the impact of unspecified testimony "cannot substitute for proof of prejudice"). Nor does Adams identify any other material change in his trial preparation, presentation, or strategy that may have resulted. In addition, we observe that while the defense raised an objection to the State's mode of introducing the conviction, it did not express any concerns about its timing, much less request a continuance or a mistrial. See State v. Knight, 734 P.2d 913, 919 & n.6 (Utah 1987) (attributing significance to the fact that the defendant requested, and was denied, both a continuance and a mistrial when the state failed to provide the defense with inculpatory statements). Moreover, we have already concluded that admission of the prior conviction was not substantively prejudicial. Under the circumstances, Adams has failed to show that he was harmed by the timing of the introduction of evidence of the prior conviction.

B. The Burden in Plain Error Review Remains with Adams.

¶24 Finally, Adams asserts that the error in notice is of such a nature that the burden should shift to the State to show that the error was harmless. As support for this contention, Adams relies on our supreme court's decisions in State v. Knight, 734 P.2d 913 (Utah 1987), a case in which the state failed to provide the defense with inculpatory statements made by key witnesses, see id. at 916, and State v. Bell, 770 P.2d 100 (Utah 1988), a case in which the state failed to provide adequate notice of the charges, see id. at 102. In those cases, the supreme court shifted the burden to the prosecution because (1) the record was of little assistance in discovering the magnitude of the prejudice to the defense or in understanding how defense counsel might have prepared differently for the case if it had adequate knowledge and (2) the defense had put on credible evidence that the errors did, in fact, impair the defense. See Bell, 770 P.2d at 106-07; Knight, 734 P.2d at 920-21. The issues in those cases, however, had been preserved for appeal. Here, we are reviewing the timing of the introduction of the prior conviction for plain error. The burden of establishing plain error is on the party asserting it. See Low, 2008 UT 58, ¶ 20. Nothing that Adams has pointed to in Knight or Bell supports a change in that burden where plain error is at issue, and Adams has not otherwise persuaded us that such a change is warranted under the circumstances of this case.

CONCLUSION

¶25 Adams has failed to demonstrate that any error in the admission of his prior

murder conviction during the prosecution's case resulted in prejudice to his defense. As a result, we affirm the conviction for first degree attempted murder.

¶26 WE CONCUR: Carolyn B. McHugh, Associate Presiding Judge William A. Thorne Jr., Judge

---

Notes:

[1]The defense did not announce that Adams would not testify until the close of the State's evidence. Therefore, we presume that at the time the rule 404(b) motion was argued, the defense was still under the assumption that the prior conviction evidence would only be offered if Adams testified and put knowledge or intent at issue, as indicated by the State's notice. When the State introduced the evidence in its case-in-chief prior to its knowing whether Adams would testify or what his testimony would be, defense counsel had an obligation to raise that issue to the trial court's attention in order to preserve it for appeal. See State v. Low, 2008 UT 58, ¶ 17, 192 P.3d 867 (requiring a party to "bring all claimed errors to the trial court's attention" by making "a timely and specific objection ... [at trial]" so that "the court [has] an opportunity to correct the errors" in order to preserve an issue for appeal (first alteration in original) (internal quotation marks omitted)).

[2]We are skeptical regarding the admissibility of the prior conviction, however, for a number of reasons, including its age and its apparent goal of establishing propensity rather than intent. As Adams points out, nothing about the known details of his prior murder conviction appear to bear directly on his intent in this case. Instead, a factfinder would have to infer that because Adams had engaged in an altercation, then fled in his car, intentionally striking and killing a person in the process fourteen years ago, he must have had that same intent when he struck Allan. The necessary inferential path from the prior conviction to Adams's intent at the time of the charged crime strongly suggests that the purpose of the evidence was to show Adams's propensity to run over people when threatened rather than to establish that he had the specific intent to kill on a particular occasion fourteen years later. As one law professor has explained,

> The conclusion that the defendant intended to commit this particular crime is the end product of a chain of inferences. It proceeds from the given proposition that the defendant at another place and time committed a crime similar to, but unconnected with, the present crime. From the proven fact—the "prior"—we are asked to infer that on a specific day and time this defendant had the specific intent to participate in the crime charged. The conclusion and its factual basis are widely separated. The gap can be bridged only by supplying an inference that the defendant has a tendency (that is, a propensity) to commit

this kind of crime. It is this inference that is not permissible.

Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 Emory L.J. 135, 158 (Winter 1989) (citing United States v. Powell, 587 F.2d 443, 447-49 (9th Cir. 1978)). Even the prosecutor's closing argument statement in reference to the prior conviction—that a "car is just [Adams's] preferred weapon"—suggests propensity much more strongly than intent (or modus operandi, another proper noncharacter purpose). The trial judge's concern about the admissibility of this evidence was therefore well founded.

[3]In opening statements, defense counsel seemed to concede that if the court believed that Adams ran over Allan twice, there was evidence of intent.

ADDENDUM C

Grant W. P. Morrison (3666)
MORRISON & MORRISON, L.C.
Attorneys for Petitioner
Alice M. Merena
352 East 900 South
Salt Lake City, Utah 84111
Telephone: (801) 359-7999
Facsimile: (801) 359-1774

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

----------oOo----------

ALICE M. MERENA, Petitioner, vs. KENNETH ALLEN MERENA, Respondent.	VERIFIED PETITION FOR DIVORCE Civil No. 074903660 Judge: Medley Commissioner: Evans

----------oOo----------

COMES NOW the Petitioner Alice M. Merena, and through her attorney Grant W. P. Morrison, and being first duly sworn upon her oath, complains against the Respondent as follows:

1. **Jurisdiction and Grounds.** Petitioner and Respondent are residents of Salt Lake County, State of Utah, and have been such for more than three (3) months prior to the filing of this action and therefore, venue is proper.

2. The Petitioner and Respondent are husband and wife, having been married on June 11, 2006 in the City of Price, State of Utah.

3. During the course of the marriage the parties have had irreconcilable differences entitling the Petitioner to a Decree of Divorce to become final upon entry by the Court. In particular, the Petitioner and the Respondent have arguments that are not resolveable and the parties have attempted counseling, which has been unsuccessful. The parties cannot resolve their differences short of divorce.

4. **Children, Custody, Parent Time and Child Support.** During the course of the marriage the parties have had born as their issue no children and none are expected.

5. There has been a Protective Order issued, which is case no. 074903538CA which should be incorporated into the divorce.

6. **Medical and Dental Insurance.** The Respondent should be ordered to maintain a policy of health, accident and dental insurance for and on behalf of the Petitioner during the pendency of this action. When the divorce is concluded each party should maintain their own insurance.

7. **Alimony.** The Respondent should pay the Petitioner a reasonable "bridge" alimony.

8. **Division of Personal Property.** The parties have acquired various items of personal property which should be divided fairly and equitably.

9. **Division of Real Property.** The parties did not acquire any real property but the Petitioner claims an interest in the appreciated value of the Respondent's pre-marital house.

10. **Retirement.** Neither party acquired any retirement during

the marriage.

11. **Debts**. The parties have acquired debts during the marriage and the Respondent should be ordered to pay the entirety of the debts acquired the parties during the marriage. Further, the expenses incurred by the Petitioner as a result of her having to relocate to an extended living facility, should be paid in their entirety by the Respondent, as well as any and all costs relating to the repair procedure to correct the Petitioner's right eye.

12. **Return of Prior Name**. The Petitioner should have her prior name of Davis.

13. **Attorney's Fees.** The Respondent should pay the Petitioner's attorney's fees.

14. Each party should be ordered to execute any and all documents relative to the effectuation of this Divorce Complaint.

WHEREFORE, the Petitioner prays this Court for the following:

1. For a Decree of Divorce consistent with this Petition.

2. For such other and further relief as the Court deems necessary and proper in the premises.

DATED this 20th day of August, 2007.

Grant W. P. Morrison
Attorney for Petitioner

Alice Michelle Merena
Petitioner

STATE OF UTAH)
:ss.
County of Salt Lake)

On the 20th day of August, 2007, personally appeared before me Alice Michelle Merena, the signer of the foregoing Verified Petition who duly acknowledged to me that she signed the same voluntarily and the contents are true to the best of her knowledge, information and belief.

NOTARY PUBLIC
GRANT W P MORRISON
952 East 900 South
Salt Lake City, Utah 84111
My Commission Expires
November 10, 2007
STATE OF UTAH

Notary Public

ADDENDUM D

79% of Utahns with court-ordered debt don't pay, investigation shows

By Lori Prichard and Linda Williams KSL 5 News

Published: Monday, Oct. 25 2010 10:44 p.m. MDT

SALT LAKE CITY — Thousands of Utahns have been fighting for months — and in many cases years — to get back millions of dollars that rightfully belong to them. The courts have issued hundreds of thousands of judgments — ordering people to pay back their debts.

But in a yearlong investigation, KSL 5 News uncovered a system that does little to force the debtor to pay and offers no guarantee of justice.

Judgments

"The judge said, yep — I mean it was clear. Here's the note. He didn't pay you. OK. He owes you the money," says Regan Fackrell, a Salt Lake County resident awarded a judgment for $100,000 in 2009.

"I was awarded a judgment of several thousand dollars," says Steve Short, a local business owner. "I was elated."

Like thousands of Utahns, Fackrell and Short won their cases and received judgments from the court. Judgments are awarded at the end of a civil court or small claims case. They order people who owe money to pay that money back, but more often than not — they don't.

"It's been two years. I haven't seen a dime," Short said.

"I will never get my money back," said Fackrell.

"It's just a piece of paper," said Brenda Simko, a Utah County resident familiar with the collections process. "It doesn't have any power. It doesn't give me back the money that I am out."

The Administrative Office of the Courts, attorneys and professional collections agents say they've seen an increase in the number of people obtaining judgments over the past two years, largely due to the bad economy. At the same time, they've seen an increase in the number of people who are unable or unwilling to pay what they owe.

"People have started to learn that it's OK if they don't pay their bills," says David Saxton,

owner of Salt Lake collections firm North American Recovery.

Saxton said his clients are suffering as a result of bad debt. He said in the past, unpaid debt accounted for 3 percent to 8 percent of a company's overall business. Now, debt accounts for 18 percent to 20 percent of his clients' business.

"It's affecting clients," Saxton said. "It's affecting their cash flow in a seriously negative way."

How many pay?

With so many Utahns seeking justice, KSL 5 News set out to measure the effectiveness of the system. Over the course of a year, we examined more than 5,000 civil court and small claims cases to see how many people actually got paid after the court said they won. We found an overwhelming majority of the people are still waiting for their money.

KSL reviewed 5,143 cases from seven district courts — big and small. Of those cases, 14 percent or 741 judgments were either dismissed, withdrawn or set aside. That left 4,402 judgments still open for collections. Seventy-nine percent of those cases remain unsatisfied — the winners still waiting for more than $31.6 million. Compare that to just 21 percent, or $2.25 million that have been paid in full.

"There are a good number of judgments that remain unpaid," says Tim Shea, staff attorney for the Administrative Office of the Courts. "It's largely because the most that the court can offer the creditor is a process."

The process

The collections process begins after the judgment is awarded. However, it only begins if the person who won the judgment — the creditor — chooses to go after his or her money.

"The creditor has to take steps to protect their interests," said Shea. "The court, again, offers tools to help do that but can't do it on their behalf."

Those tools include: 1) writs of garnishment, 2) writs of execution, 3) supplemental orders and 4) property liens.

On your own

Utah County landlords Brenda and Dan Simko know how difficult the collection process

can be. For the past 20 years, they've spent hundreds of hours chasing down money from tenants who don't pay their rent.

"It's frustrating because you feel like you're really on your own," Brenda Simko said.

"You can get a judgment, but how are you going to collect?" added Dan Simko.

Like a growing number of Utahns, the Simkos have chosen to go through the legal process on their own without the help of an attorney. Brenda Simko is a stay-at-home mother of seven, but spends her free time teaching herself the legal process. She surfs the court's website, translates the legalese into English and takes the process step-by-step. The Simkos say they've had some success collecting because of Brenda's perseverance and attention to detail and deadlines. But they say they probably wouldn't have had much luck if she worked outside the home.

"If I went to another place of employment, the courthouse is only open during the same hours that I would be at work. It would be really, really tough," she said.

And expensive. The creditor must pay all costs up front — to file paperwork, to have legal notices served, to pay attorney's fees. Saxton said it has gotten so bad that his collections firm doesn't even pursue smaller amounts of money any more because the chances of collecting are too small and the costs of collecting too high.

"By the time you get to a garnishment you can easily have spent anywhere from $200 to $500," Saxton said.

North American Recovery has spent 18 years collecting money for clients. It has its own legal team that goes after debt and every month its lawyers obtain roughly 600 judgments. Saxton said without them, it would be nearly impossible to collect.

"It would be overwhelming," he said. "If somebody doesn't know how to do that, doesn't know all the hoops they have to jump through, I cannot imagine them being able to have any success collecting a judgment at all."

Attorney Richard Terry agrees. He represents banks, businesses and everyday people during the judgment and collection process. He said the average person could figure out how to do it on their own, but it would be very difficult. Still, he admits, even if someone does hire an attorney, they may never see results.

"It's certainly easier for us because we know exactly how to do it. We know all the tricks.

We know how to get around a lot of the tricks, but you still have that same fundamental problem," Terry said. "The old saying goes, 'You can't squeeze blood out of a turnip.' And so if there's no blood there, even the attorney can't get it."

No $, no resolution

Debtors elude payment in a number of ways. Oftentimes they don't have a job — or quit their job — so their wages can't be garnished. If they own property of any kind, they'll transfer that property into someone else's name so it can't be seized or sold to pay off their debt. And they'll skip — meaning they disappear and do what they can to keep from being found. However, the most common way many avoid debt is by filing bankruptcy.

"If they file bankruptcy then they can eventually obtain a discharge, meaning they don't have to pay the debt at all. It's gone," Terry said.

Regan Fackrell understands all too well how a bankruptcy can leave a creditor with no recourse. Last year, he told KSL he was worried the person who owed him money would use that tool to get out of paying his $100,000 judgment.

"A judgment would be wiped away with one bankruptcy," Fackrell explained.

Sure enough, a year later, that person filed bankruptcy. Now Fackrell's only option is to start the process all over again — in federal bankruptcy court — because once someone files bankruptcy, all state collection efforts stop.

No enforcement

Shea agrees the process offered by the court can be tough. The law that allows you to win a judgment stops short of providing any muscle you might need to get paid on it. The reason?

"The mere fact of non-payment is not a criminal act," he said.

No crime means an officer won't come to make an arrest, no jail time and no real penalty to enforce the debtor to make payment. Shea said the state isn't going to spend more money or hire more people to help chase down unpaid debts. It would cost the taxpayers hundreds of thousands of dollars — if not more — and by acting as the collector, Shea said the court would be unable to maintain its neutrality in the case.

"The process that we offer from the initial filing of the complaint to the last satisfaction

of judgment has to be a fair process in which both parties are treated equally," he said. "It's not always clear the creditor is in the right, and so the court is required to resolve those disputes."

While the court can't collect on behalf of the creditors, Shea said it does offer them some help — a book, a DVD and a class on how to collect on a judgment. Shea teaches the class once a month. He says it was originally the tail end of a class on the small claims process, but it took up so much time they had to create a separate course for it.

But even when creditors attend the class, many still find the process discouraging.

"It'd be easier to employ … Dog the Bounty Hunter," remarked one creditor, causing the classroom to erupt in laughter.

Credit impact

If debtors can elude payment and the courts provide no real method of enforcing payment, what's the worst that can happen to someone who doesn't ante up? A ding on their credit.

Representatives from credit bureaus Experian, Equifax and Trans Union said the agencies constantly pull court records in search of judgments. The judgment then appears on a debtor's credit reports as a derogatory mark where it remains for seven years — even if the debt is paid. But Saxton said the threat of bad credit doesn't really matter anymore.

"They can still go out and get a loan even if they have bad credit," he said. "So people just are learning they don't have to pay."

Are judgments worth it?

No doubt, the odds are stacked high against people who fight for their money, so why do so many bother? It depends on who you ask.

"'Cause I can't afford to house the world," said Brenda Simko.

"It's about principle," said Short. "It's all about being vindicated and asserting that I was right about what I was trying to collect."

Regardless of the motivation, are judgments worth it in the end? That, too, depends on who you ask.

"Sometimes it's just best to walk away, we'll have to see," said Teresa Giles, a Utah County resident just starting the collection process on a $40,000 judgment.

"You need to be able to have a way to collect your money," said Dan Simko. "There has to be some accountability."

"I believe they are definitely worth it because people, otherwise, simply are not enforcing their rights," Shea said.

"Will the judgment do anything for me?" asks Fackrell, as he throws his hands in the air out of frustration.

Bottom line, judgments are difficult to collect and there's very little anyone can do to force people to pay. A judgment expires after eight years, but if you feel it's worth it, you can pay more money and have the judgment renewed.

Experts suggest creditors do everything they can on their own — follow court deadlines, file the proper paperwork and make sure everything is correct. If, after all that, they still can't get answers, they recommend creditors hire a professional to help them along.

But even then, there are still no guarantees.

e-mail: lprichard@ksl.com; lwilliams@ksl.com

http://www.deseretnews.com/m/article/700076359